

CONSUMER ACCESS TO INFORMATION ACT OF 2004

MARCH 16, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BARTON of Texas, from the Committee on Energy and Commerce, submitted the following

R E P O R T

[To accompany H.R. 3872]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 3872) to prohibit the misappropriation of databases while ensuring consumer access to factual information, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

CONTENTS

	Page
Purpose and Summary .....	1
Background and Need for Legislation .....	2
Hearings .....	4
Committee Consideration .....	4
Committee Votes .....	4
Committee Oversight Findings .....	4
Statement of General Performance Goals and Objectives .....	4
New Budget Authority, Entitlement Authority, and Tax Expenditures .....	4
Committee Cost Estimate .....	5
Congressional Budget Office Estimate .....	5
Federal Mandates Statement .....	6
Advisory Committee Statement .....	6
Constitutional Authority Statement .....	6
Applicability to Legislative Branch .....	6
Section-by-Section Analysis of the Legislation .....	7
Changes in Existing Law Made by the Bill, as Reported .....	7

PURPOSE AND SUMMARY

H.R. 3872, the Consumer Access to Information Act of 2004, prohibits the misappropriation of databases while preserving consumer access to factual information. The misappropriation of a

database is treated as a violation of a rule defining an unfair or deceptive act or practice under the Federal Trade Commission Act.

#### BACKGROUND AND NEED FOR LEGISLATION

##### *The importance of databases to commerce*

One of the basic tenets of intellectual property law holds that facts are not copyrightable, recognizing the great need to widely disseminate factual information. To qualify for copyright protection a work must be original to the author and possess a minimal degree of creativity. It is a well-established principle that no one may claim originality as to facts. Facts, by their very nature, are discovered not created and therefore, are part of the public domain.

This policy has served commerce well. The culture of business and science involves using existing data in different ways, or combining existing data with newly generated data. Information is the foundation to advances in medical and other scientific research. It is also a fundamental element of innovation in products and services. Allowing scientists and businesses to access and use factual information propels society forward rather than relegating important resources to “reproducing” the same information.

##### *The “sweat of the brow” doctrine and Feist*

While the majority of courts through U.S. history had upheld the policy that facts are not copyrightable, a minority of courts granted copyright protection to factual compilations under the “sweat of the brow” doctrine. The courts reasoned that even in cases in which a database lacked creativity or originality, a publisher was entitled to protection because of the time and resources expended in collecting and organizing the information.

In 1991, the Supreme Court in *Feist Publications, Inc. v. Rural Tel. Ser. Co.*, 499 U.S. 340 (1991), rejected the “sweat of the brow” doctrine. The Court reaffirmed that originality is the central component of copyright. While explaining that the vast majority of factual compilations will pass the originality test, the Court emphasized that compilations of factual information would receive only limited protection. The Court explained that the copyright in a factual compilation extends only to the author’s original contributions, not the facts or information conveyed.

##### *History of congressional action*

The *Feist* decision started a debate as to whether database producers would continue to invest resources in the creation and maintenance of databases. This debate has been ongoing since the 104th Congress, with various versions of property rights and misappropriation bills moving between the Committee on Energy and Commerce and the Committee on the Judiciary.

Over those years, the proponents of database legislation have produced no compelling evidence that there is any danger to the continued prosperity of the database industry. In fact, the 2003 report by Dr. Martha E. Williams entitled, “The State of Databases Today,” showed an increase in the total number of databases as well as an increase in the private sector’s share of the database market. Since the *Feist* decision, the database market has grown 147 percent. The amount of information contained in the databases

increased at an even greater rate, 363 percent. In addition, there has been a steady shift in database production, away from government and academic production and toward private sector production. In 1990, government databases made up 17 percent of the database market, academic databases made up 12 percent, and private sector databases made up 68 percent. By 2002, the private sector had grown to constitute 90 percent of the total database market.

Furthermore, there exist a number of state and Federal remedies to protect investments in databases. Those remedies include copyright, the Computer Fraud and Abuse Act, contract, and trespass to chattels. Database producers have been successful in protecting their products using these available remedies. Though the Committee has not seen compelling evidence of a “gap” in existing legal remedies after the decision in *Feist*, the Committee does support a narrowly tailored misappropriation statute that balances the needs of database producers with Constitutional protections involving the use of factual information.

#### *Committee action*

The Committee opposes creating new and untested protection for factual information when harm has not been demonstrated and there exist a number of federal and state remedies to protect databases. The Committee received a referral on H.R. 3261, the Database and Collections of Information Misappropriation Act. Because of the limited nature of the referral, the Committee on Energy and Commerce was unable to address the many problems raised by the bill as reported by the Committee on the Judiciary.<sup>1</sup> Instead, the Committee introduced and passed H.R. 3872, the Consumer Access to Information Act of 2004. H.R. 3872 offers more limited protection to databases while preserving consumer access to and use of factual information.

H.R. 3872 is based on the Supreme Court decision in *INS v. AP*, 248 U.S. 215 (1918) and by the 2nd Circuit Court of Appeals decision in *NBA v. Motorola*, 105 F.3d 841 (2nd Cir. 1997). *NBA v. Motorola* sets forth the following five factor test to establish a claim for misappropriation and survive preemption by the federal Copyright Act: (1) a person generates or collects the information in the database at some cost or expense; (2) the value of the information is highly time sensitive; (3) another person’s use of the information constitutes free-riding on the first person’s costly efforts to generate or collect it; (4) the other person’s use of the information is in direct competition with a product or service offered by the first person; and (5) the ability of other parties to free-ride on the efforts of the first person would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. H.R. 3872 codifies this approach.

The bill provides for effective enforcement by the Federal Trade Commission (FTC). The FTC has a long history in the areas of consumer protection and unfair competition. Exclusive enforcement by a federal regulator eliminates the fear that the legislation could be used as an anticompetitive tool that would chill the use of factual information.

<sup>1</sup> Those problems are detailed in the Committee report to H.R. 3261.

H.R. 3872 will offer protection for database producers while preserving important access to factual information. H.R. 3872 should also pass Constitutional scrutiny because it tracks the strict misappropriation standards set forth by both the Supreme Court and the 2nd Circuit Court of Appeals.

#### HEARINGS

The Subcommittee on Commerce, Trade and Consumer Protection has not held hearings on H.R. 3872. However, the Subcommittee held a joint hearing with the Committee on the Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property on a discussion draft of what would become H.R. 3261 on September 23, 2003. At that hearing, the Subcommittee received testimony from: David Carson, General Counsel, United States Copyright Office; Thomas J. Donohue, President and CEO, Chamber of Commerce; Keith Kupferschmid, Vice President, Intellectual Property Policy & Enforcement, Software & Information Industry Association; and William Wulf, President, National Academy of Engineering and Vice Chairman, National Research Council.

#### COMMITTEE CONSIDERATION

On February 25, 2004, the Subcommittee on Commerce, Trade, and Consumer Protection met in open markup session and approved H.R. 3872 for Full Committee consideration, without amendment, by a voice vote. On March 3, 2004, the Committee met in open markup session and ordered H.R. 3872 favorably reported to the House by a voice vote, a quorum being present.

#### COMMITTEE VOTES

There were no record votes taken in connection with ordering H.R. 3872 reported. A motion by Chairman Barton to order H.R. 3872 reported to the House, without amendment, was agreed to by a voice vote.

#### COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee has not held oversight or legislative hearings on this legislation. However, the Subcommittee held a joint hearing with the Committee on the Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property on a discussion draft of what would become H.R. 3261 on September 23, 2003.

#### STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

H.R. 3872 prohibits the misappropriation of databases while preserving consumer access to factual information.

#### NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 3872, the Consumer Access to Information Act, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

## COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

## CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, March 11, 2004.*

Hon. JOE BARTON,  
*Chairman, Committee on Energy and Commerce,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3872, the Consumer Access to Information Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Melissa E. Zimmerman (for federal costs), Sarah Puro (for the state and local impact), and Paige Piper/Bach (for the private-sector impact).

Sincerely,

ELIZABETH ROBINSON  
(For Douglas Holtz-Eakin, Director).

Enclosure.

*H.R. 3872—Consumer Access to Information Act of 2004*

H.R. 3872 would deem the misuse of another person's database an unfair method of competition and an unfair or deceptive act or practice in commerce. Under current law, the Federal Trade Commission (FTC) has the authority to monitor and take enforcement actions against such violations. Based on information provided by the FTC, CBO estimates that implementing H.R. 3872 would have no significant effect on spending subject to appropriation and would not affect direct spending. Because the FTC would have the authority to assess monetary penalties to enforce the bill, CBO estimates that enacting H.R. 3872 would increase revenues, but we expect that any additional revenues from penalties would be insignificant.

H.R. 3872 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

By prohibiting any person from misappropriating a database, H.R. 3872 would create a new private-sector mandate as defined in UMRA. Under the bill, the term "misappropriation of a database" generally means a person's use of information from a database generated by another person without proper authorization when: (1) the database was generated at some cost or expense; (2) the value of the information on the database is highly time-sensitive; (3) the use constitutes "free-riding" on the originator's costly efforts to generate or collect the data; (4) the use is in direct competition with a product or service offered by the originator; and (5) such use

might eliminate the incentive to produce the product or service. Currently, database owners may seek relief for the misuse of a database under state misappropriation, contract, or unfair competition laws and, in some circumstances, under federal copyright laws.

The cost of complying with the mandate would be either the cost of obtaining permission for using the data through a contract or license or the revenue forgone by not being able to use the data. CBO cannot estimate the cost of the mandate because we do not have enough information to determine the scope and incremental impact of this additional prohibition on misuse of a database.

On February 10, 2004, CBO transmitted a cost estimate for H.R. 3261, the Database and Collections of Information Misappropriation Act, as ordered reported by the House Committee on the Judiciary on January 21, 2004. On March 8, 2004, CBO transmitted a cost estimate for H.R. 3261, as ordered reported by the House Committee on Energy and Commerce on March 3, 2004. The two versions of H.R. 3261 are identical. H.R. 3261 would allow parties who create or maintain databases to file civil suits against persons who misuse those databases. H.R. 3872 would create a new federal law prohibiting misappropriation of a database, which would be enforced by the FTC. What constitutes a misappropriation of a database is slightly different in the two bills. In both cases, CBO has no basis for estimating the costs of the mandate. CBO estimates that the federal cost of implementing either of the two bills would be insignificant.

The CBO staff contacts for this estimate are Melissa E. Zimmerman (for federal costs), Sarah Puro (for the state and local impact), and Paige Piper/Bach (for the private-sector impact). The estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

#### FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

#### ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

#### CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

#### APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

## SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

*Section 1. Short title*

Section 1 establishes the short title of the Act as the “Consumer Access to Information Act of 2004.”

*Section 2. Misappropriation of a database*

Section 2 deems the misappropriation of a database an unfair method of competition and an unfair or deceptive act or practice in commerce under section 5(a)(1) of the Federal Trade Commission Act. It sets forth a five-factor test to determine whether there has been a misappropriation. The five conditions to be proved are: (1) a person generates or collects the information in the database at some cost or expense; (2) the value of the information is highly time sensitive; (3) another person’s use of the information constitutes free-riding on the first person’s costly efforts to generate or collect it; (4) the other person’s use of the information is in direct competition with a product or service offered by the first person; and (5) the ability of other parties to free-ride on the efforts of the first person would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.

*Section 3. Limitation on liability of certain entities*

Under Section 3, no provider of an interactive computer service can be held liable under the Act for making available information that is provided by another information content provider. The terms “interactive computer service” and “information content provider” have the same meanings given to those terms in section 230(f) of the Communications Act of 1934.

*Section 4. Remedies*

Section 4 treats the violation of the Act as a violation of a rule defining an unfair or deceptive act or practice under section 18(a)(1)(B) of the Federal Trade Commission Act (FTC Act). It also grants the Federal Trade Commission authority to enforce the Act under the same terms and provisions for enforcement under the FTC Act.

*Section 5. Exclusions*

Section 5 contains a savings clause for securities laws, regulations, and market data. The exclusion applies to information with respect to quotations for, or indications, orders, or transactions in, securities. This exclusion includes, but is not limited to, the National Best Bid and Offer. No new rights are created in market data by this Act.

## CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.